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No. 84-380

In The

Supreme Court of the United States

October Term, 1984

JAMES DAVID OSTICCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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In light of the Solicitor-General's representation that the United States is considering seeking certiorari review of a subsequently decided Third Circuit decision holding that the Confrontation Clause requires a showing of the extra-judicial declarant's unavailability as a prerequisite to F.R. Evid. 801(d)(2)(E) admissibility, petitioner urges that the present petition should be granted, or at least deferred pending the Solicitor's decision on the subsequently decided case, because the present case is more worthy of certiorari review.

Mr. Justice White, dissenting from the denial of certiorari, in *Sansom v. United States,* ____ U.S. ____, 82 L. Ed. 2d 861 (No. 83-6454; June 25, 1984) sets forth the parameters of the existing division in the Circuits respecting the admissibility standards for co-conspirator declarations:

> In Ohio v. Roberts, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240 (1980), the Court held that the introduction of hearsay statements against a criminal defendant will not violate the Confrontation Clause if two requirements are satisfied. First, the prosecution must ordinarily demonstrate the unavailability of the declarant; second, the statements must bear sufficient "indicia of reliability." Id., at 65-66, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240. The Court noted that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Id., at 66, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240. The question presented in this case is whether statements that satisfy Fed. Rule Evid. 801(d)(2)(E), which provides for the admissibility of statements of coconspirators, necessarily satisfy the requirements of the Confrontation Clause.
>
> The circuits are divided on the question whether coconspirator statements fall within the "firmly rooted hearsay exception" language of Roberts or whether, instead, a case-by-case inquiry into reliability is required.

* * *

> Because of the substantial confusion surrounding this frequently recurring issue, I would grant certiorari to resolve the conflict.

This issue has received considerable attention in the Third Circuit. In the panel decision in *United States v. Gibbs,* 703 F. 2d 683 (3d Cir. 1983) (withdrawn) it was held that the government must demonstrate unavailability of an extra-judicial declarant when it seeks to admit co-conspirator declarations under Federal Rule of Evidence 801(d)(2)(E). The panel decision was vacated and the *en banc* decision avoided the issue by holding that the defendant had failed to preserve for appeal the confrontation issue. *United States v. Gibbs,* 739 F. 2d 838 (3d Cir. 1984) (*en banc*) (petition for certiorari pending).

Recently, a panel of the Third Circuit has again held, consistent with the withdrawn panel decision in *Gibbs,* that the government must prove unavailability. *United States v. Inadi,* ____ F. 2d ____, No. 83-1882 (3d Cir., November 13, 1984).

In the brief for the United States in opposition to the present petition, the Solicitor has said:

> The Third Circuit has recently held that the Confrontation Clause requires a showing of unavailability of the extra-judicial declarant as a prerequisite to admission of co-conspirator declarations under Rule 801(d)(2)(E). *United States v. Inadi,* . . . We do not agree with this holding and are currently considering whether to seek *en banc* or certiorari review in that case. It is, however, wholly immaterial here [referring to the present petition], since there is no suggestion that the procedures followed in this case are not entirely adequate to demonstrate unavailability. (Fn. 4, Brief In Opposition).

The present case was tried in the United States District Court for the Middle District of Pennsylvania after the *Gibbs* panel decision, but before the *en banc* decision. The trial judge, in accordance with the *Gibbs* panel decision, required the government to demonstrate "unavailability". This procedure would likewise be in accordance with the recently decided panel decision in *Inadi, supra.*

The extra-judicial declarant asserted Fifth Amendment privilege and the trial judge held that the extra-judicial declarant, *i.e.*, co-conspirator was therefore "unavailable".

The present petition raises the point, preserved in the court below, that where the government is the proponent of the out-of-court declarations of the co-conspirator declarant, the declarant is not truly "unavailable" to the government because of the government's unique power to remove Fifth Amendment privilege by grant of testimonial immunity. Petitioner has not suggested that the government need necessarily always grant the testimonial immunity, it being evident that there are many situations in which the public interest would be disserved by the grant of testimonial immunity. Petitioner's point is that where the government is the proponent of extra-judicial declarations it should be required to make an appropriate showing in support of its decision to withhold testimonial immunity before the out-of-court declarant may truly be deemed unavailable.

In its brief in opposition, the government argues that petitioner has made no showing that had the extra-judicial declarant testified at trial his testimony would have been favorable to petitioner and, in any event, had the in-court testimony been favorable the declarant could have been impeached by his earlier out-of-court declarations (Brief in Opposition at p. 9).

The government's position misses the thrust of petitioner's point. Petitioner has argued that he was deprived of his right of confrontation, not necessarily some purported right to favorable testimony. With respect to the out-of-declarant's statements, petitioner was left without his fundamental right to confront the evidence. Moreover, it is simply not known what the declarant would have said had he testified at trial.

Mr. Justice White has noted that there is "substantial confusion surrounding this frequently recurring issue" in the Circuits. The present case, in petitioner's view, offers an ideal record for consideration of the pertinent issues because the present case combines both the core issue of interplay between the Confrontation Clause and F.R. Evid. 801(d)(2)(E) and the issue, specifically presented for review, of the procedural method for determining "unavailability" of the out-of-court declarant if he asserts Fifth Amendment privilege. Petitioner suggests that if the Court is to consider the Confrontation Clause issue, the most appropriate setting for such consideration is in a case, as here, where there has been an assertion of privilege by the declarant against the backdrop of a fully developed record. Petitioner makes this suggestion because this is the most frequent manner in which the issue may be expected to come up — "co-conspirators" will, by the nature of their exposure to prosecution almost inevitably assert such privilege.

Respectfully submitted,

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